Supreme Court, U.S.
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In the Supreme Court of the United States

October Term 1999

RICHARD BERT ALLENDER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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4688

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United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
March 19,1999

Before

Hon. Richard D. Cudahy, *Circuit Judge*

Hon. John L. Coffey, *Circuit Judge*

Hon. Daniel A. Manion, *Circuit Judge*

Richard B. Allender, Petitioner-Appellant,	Appeal from the United States District Court for the Southern District of Indiana,
No.97-2919	Indianapolis Division.
V.	No.96 C 420
United States of America, Respondent-Appellee.	**John D. Tinder,** *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed by Petitioner-Appellant on December 18, 1998, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 97-2919

RICHARD B. ALLENDER,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee,

Appeal from the United States District Court
for the Southern District of Indiana
Indianapolis Division
No. 96 C 420 **John D. Tinder**, *Judge.*

Submitted September 10, 1998*
Decided November 4, 1998

Before CUDAHY, COFFEY, and MANION
Circuit Judges

ORDER

A jury convicted Richard Allender of eight counts Of bank fraud in violation of 18 U.S.C. § 1344. He was sentenced to Fifty-one months imprisonment on each count, to be served concurrently, followed by five years of supervised release. We

previously affirmed the convictions and the sentence on direct appeal. *See United States v. Allender*, 62 F.3d 909 (7th Cir. 1995), *cert. denied*, 516 U.S. 1076 (1996). On March 28, 1996, Allender filed a motion for relief from judgment under 28 U.S.C. § 2255, which the district court denied. On appeal, Allender contends that his trial counsel was ineffective, the indictment omitted the jurisdictional element of the crime, the evidence concerning whether the FDIC insured the Bank was insufficient, and he was entitled to an evidentiary hearing on his § 2255 motion. We affirm.

* This successive appeal has been assigned to the original panel pursuant to Internal Operating Procedure 6(b). The panel heard oral argument on the initial appeal and is unanimously of the view that a second oral argument is unnecessary.

I. Background

We assume familiarity with the facts set forth in our previous opinion and only briefly restate them here. between September 1989 and July 1991, Allender obtained a series of loans from the First State Bank of Morgantown, Indiana, under fraudulent pretenses, for which he was indicted. At trial, Allender was convicted of eight counts of bank fraud in violation of 18 U.S.C. Sect. 1344. In 1995, on direct appeal, Allender challenged his conviction and sentence. Finding his arguments to be without merit, we affirmed his conviction and sentence. *see* , Allender, 62 F.3d at 918.

II. Discussion

A. Defective Indictment

Allender maintains that the superseding indictment was defective because it failed to set forth the jurisdictional element of the Crime charged. Specifically, he asserts that the indictment did not state that the FDIC insured the First State blank of Morgantown.

We review *de nova* the sufficiency of an indictment. *See United States v. Webster,* 125 F.3d 1024, 1029 (7th Cir, 1997), *cert denied,* 118 S. Ct. 698 (1998). Although the sufficiency of the indictment is a jurisdictional issue which a defendant may raise at any time we liberally construe an indictment in favor of sufficiency when it is challenged after jeopardy has attached. *See United States* v. *Just* 74 F.3d 902, 904 (8th Cir. 1996). Where a defendant did not challenge the sufficiency of the indictment before the close of the government's case, the indictment must be upheld "unless it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant is convicted." *United States v. Gooch,* 120 F.3d 78, 80 (7th Cir. 1997) (quoting *United States* v. Watkins, 709 F.2d 475, 478 (7th Cir. 1983)).

An indictment is constitutionally sufficient if it "first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States,* 418 U.S. 87, 117 (1974). An indictment usually will be sufficient if it uses the language of the statute when setting forth the offense and unambiguously sets out all of the elements necessary to constitute the offense. *See United States v, Yoon,* 128 F.3d 515, 522 (7th Cir. 1997). It will be read to include facts which are necessarily implied and construed according to common sense. *United States v. Palumbo Bros.,Inc.,* 145 F.3d 850 ,860 (7th Cir.), *cert denied,* 1998 WL 650927 (U,S. Oct.19, 1998) (No. 98-429). Accordingly, an indictment may allege an essential element of an offense by using a term of art which is generally understood or defined by statute. *See Hamling,* 418 US, at 118; *United States v. Hagmann,* 950 F.2d 175, 185 n.20 (5th Cir. 1992)

The indictment provided Allender with a description of the charges against him which was sufficient to enable him

to prepare his defense, to plead double jeopardy against a second prosecution, and to inform the trial court of the facts alleged so that it could determine the sufficiency of the charge *See Yoon,* 138 F.3d at 521-22. While the indictment could have been drafted with greater specificity, it did state that a "financial institution" was defrauded. For purposes of Title 18, these terms includes a bank insured by the FDIC. *See* 18 U.S.C. Sect. 20(1). By tracking the statute, the indictment properly alleged the elements of a violation of 18 U.S.C. 1344 The Constitution requires no more than this. *See United States v. Woodruff*, 50 F.3d 673,676 (9th Cir. 1995)("Although the indictment contained no facts alleging how interstate commerce was interfered with, and did not state any theory of interstate impact... the indictment was sufficient as written"). Accordingly as we mentioned in addressing his direct appeal, "Allender does not seriously contend that the indictment failed to inform him of the elements of the offense or allow him to prepare a defense. It clearly conforms to the minimal constitutional standards..." *Allender*, 62 F.3d at 915.

B. Sufficiency of the Evidence

Allender also argues that the evidence was insufficient to establish that the Bank was insured by the FDIC. The federally-insured status of a bank is an element of the crime defined by 18 U.S.C. § 1344. *United States v. Locklear*, 97 F.3d 196, 199 (7th Cir. 1996). Accordingly, the government was obliged to present evidence proving the existence of this element beyond a reasonable doubt. *See Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). Like any element of a crime, a jurisdictional element mnay be proven by circumstantial evidence. *See United States V. Bellucci,* 995 F.2d 157, 160 (9th Cir. 1993). In reviewing the sufficiency of the evidence, we must view the evidence in a light most favorable to the prosecution, and we must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319,

324. Because the jury rendered a verdict of guilty, the government is entitled to all inferences that are reasonably derived from the evidence. *See United States* v. *Alcantar*, 83 F.3d 185, 189 (7th Cir, 1996).

In the present case, Allender concedes that the FDIC certificate of insurance was admitted into evidence. Indeed, the Govermnent stated that it was offering the evidence as "proof of the element that at all times relevant to this case the First State Bank of Morgantown was, in fact, a bank whose deposits were insured by the Federal Deposit insurance Corporation." Furthermore, the President of the Bank-Dean Hawkins-testified about FDIC examiners auditing the Bank and ordering it to take corrective action concerning the loans at issue here. Additionally, another bank employee-Patricia Weaver-testified on cross-examination that UCC filings were made at the request of the FDIC and, implicitly, that the FDIC exercised oversight concerning loans arid collateral pledged for loans. Allender did not present any evidence that the Bank was not FDIC insured. Rather, the insured status of the Bank was an essential part of his defense insofar as he argued that the Bank renewed the loans at issue here, not because of Allender's fraud but because it sought to evade FDIC scrutiny of its bad loans. In light of the evidence, and Allender"s reliance on the Bank's FDIC status in presenting his defense, we believe that a rational jury could draw the reasonable inference that the Bank was insured by the FDIC at the time the offenses were committed. Therefore, this claim is also without merit.

C. Ineffective Assistance of Trial Counsel

Allender also that his trial counsel -Richard Kiefer- was ineffective because he failed to investigate the case, waived Allender's right to a speedy trial, failed to object to the lack of a jurisdictional element in the indictment, failed to challenge the sufficiency of the evidence concerning the inured status of the

Bank, failed to interview and call several witnesses, and failed to object to the calculations at sentencing.

Whether counsel has rendered constitutionally ineffective assistance is a mixed question of law and fact and is reviewed *de novo*. *See Strictland v, Washington*, 466 U.S. 668, 698 (1984); *Stoia v. United States*, 109 F.3d 392, 395 (7th Cir. 1997). To prevail, Allender must demonstrate that his attorney committed serious errors that "fell below an objective standard of reasonableness," and that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strictland*, U.S. at 687-88; *see Lockhart v, fretwell*, 506 U.S. 364, 369 (1993). He must overcome the "strong presumption that counsel rendered reasonably effective assistance." *United States* v. *Limehouse*, 950 F.2d 501, 503 (7th Cir. 1991).
(quotations omitted).

An examination of Allender's arguments and supporting affidavits indicates that he cannot satisfy either prong of *Strictland*. The district court properly found that Allender's claim concerning failure to investigate the case and to call other witness is largely speculative. Allender failed to show that Kiefer's decision not to interview or call these witnesses at trial was unreasonable or prejudicial. Simlarly, he failed to demonstrate that Keifer's waiver of his rights under the Speedy Trial Act caused him any harm, particularly in light of the fact that Allender waived this right on three other occasions *See generally* 18 U.S.C. § 3161(c)(l). As to the loss calculations, his counsel forcefully argued at the sentencing hearing that the loss was incorrectly calculated, and he cross-examined all of the government's witnesses who testified on this issue. This hardly qualifies as ineffective assistance. Concerning the indictment, we have already noted that any imperfections did not constitute insufficiency, and thus the trial court properly had jurisdiction. Accordingly, any objections by Kiefer on these points would have been futile,

and the failure to raise futile objections is not ineffective assistance. *See United States v. Cooke*, 110 F.3d 1288, 1302 (7th Cir. 1997). Likewise, counsel's failure to object to the sufficiency of the evidence was not ineffective assistance. Because the Bank was FDIC-insured, if such an objection had been, made and sustained, the government could have remedied any perceived insufficiency merely by asking Hawkins or Weaver whether the Bank was insured. Yet Kiefer made no such objection, probably because the insured status of the Bank was a facet of his defense. Because he has failed to demonstrate that Kiefer's conduct was unreasonable or caused him prejudice, Allender cannot show that his trial counsel's assistance was ineffective

D Evidentiary Hearing

Finally, Allender argues that the district court erred in failing to hold an evidentiary hearing on the ineffective assistance of counsel claim. The question of whether to conduct an evidentiary hearing on a § 2235 motion is within the sound discretion of the district court; we therefore review the district court's decision for an abuse of discretion *See Prewitt v. United States*, 83 F.3d 812 820 (7th Cir. 1996). A hearing is not required if it is apparent from the record that the petitioner is not entitled to relief. *See Daniels v. United States*, 54 F.3d 290, 293 (7th Cir. 1995). For hearing to be granted, "the petition must be accompanied by a detailed and specific affidavit which shows that the petitioner had actual proof of the allegations going beyond mere unsupported assertions," *Prewitt*, 83 F.3d at 819 (quoting *Barry v. United States*, 528 F.2d 1094,1101 (7th Cir. 1976)).

Allender seeks a hearing to demonstrate that witnesses existed whom Keifer failed to interview or call to testify at trial, and that Kiefer forged his signature on a waiver of his rights under the Speedy Trial Act. To support this claim, he

has appended several affidavits which are Speculative and do not show that Allender had actual proof to support his allegations. Because the affidavits are speculative or set forth irrelevant facts, there is no reason to believe that a hearing would have produced evidence entitling Allender to relief. *See United States v. Taglia*, 922 F.2d 413, 419 (7th Cir. 1991). Indeed, none of the evidence propounded by Allender demonstrates that Keifer's representation fell below an objective standard of reasonableness or that, but for Kiefer's purported errors, the result would have been different. Therefore, the district court did not abuse its discretion in declining to conduct an evidentiary hearing

III. Conclusion

Allender has not shown that the indictment failed to charge the offenses for which he was convicted, Furthermore, there was sufficient evidence to establish that the First State Bank of Morgantown was insured by the FDIC. Allender's ineffective assistance of counsel claim fails because counsel's representation at trial did not fall below an objective standard of reasonableness, nor did his conduct deny Allender a fair trial. Finally, as it is apparent from the record that Allender is not entitled to relief the district court did not err in refusing to grant an evidentiary hearing.

AFFIRMED

A True Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

vs. IP 96-0420-C-T/F
IP 93-0079-CR-T/F

RICHARD BERT ALLENDER,

Defendant-Petitioner.

ENTRY DENYING MOTION FOR RELIEF
PURSUANT TO 28 U.S.C. SECT. 2255 AND
DIRECTING ENTRY OF FINAL JUDGMENT

This cause is before the court on the Defendant's motion for relief pursuant to 28 U.S.C. § 2255. The court has before it, as will be detailed later, the voluminous amount of filings by the Defendant. The court has considered these filings, and has also considered the expanded record, consisting of the file in *United States of America v. Richard Bert Allender*, No. IP 93-79-CR-O1, and finds that the Defendant is not entitled to the relief he seeks in this action. Accordingly, his motion must be **DENIED** and the action dismissed.

I. Introduction

The Defendant-Petitioner, Richard Bert Allender ("Allender"), is called "Termite" by his family and friends. In this case, however, a more fitting nickname would be "Squid." Like a squid, Allender has released a cloud of ink, hoping that

in the confusion he will escape the consequences of his criminal conviction. As Allender's claims and arguments are scattered throughout his filings, the court will now list those documents Allender has filed which the court has considered in preparing this entry. The first column contains the date of the filing, the second column the title, and the third column a short form for reference in this entry.

3/28/96	Motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody	[3/28 Mot.]
3/28/96	Memorandum of Richard B. Allender in Support of § 2255 petition	[3/28 Memo]
5/17/96	Motion asking leave of this court to amend Allender's §2255 motion and supporting memorandum	[5/17Mot]
5/17/96	Memorandum in support of Allender's motion to amend his § 2255 motion	[5/17Memo]
7/1/96	Motion asking leave of this court to further amend Allender's § 2255 motion	[7/1Mot]
7/1/96	Memorandum of law in support of Allender's motion to further amend his § 2255 motion	[7/1Memo]
7/1/96	Affidavit in support of § 2255 now before this honorable court	[7/1 Aff]

7/17/96	Motion for request of leave of court to further amend	[7/17 Mot]
7/39/96	(Reply) Amendment in support of petitioners § 2255 and affidavit to overcome procedural default and cause and prejudice	[7/30 Reply]
8/5/96	Clarification	[8/5 Clarif]
8/19/96	Motion to Release Sealed Documents	[8/19 Mot]
8/19/96	Affidavit and recusal of the United States Attorney's office and attorneys	[8/19 Aff]
10/3/96	In response to the Government's "Entry Discussing Selected Matters"	[10/3 Resp]
10/3/96	Motion for enlargement of time and clarification	[10/3 Mot]
10/21/96	Motion to Deny Government's motion for leave to supplement response in answer to § 2255 motion and motion for an enlargement of time to file findings of fact and conclusions of law	[10/21 Mot]
10/29/96	Reply to Government's Response to Petitioners § 2255 motion	[10/29 Reply]

12/16/96	In response to the Government's supplement to answer to § 2255 motion.	[12/16 Resp]
12/16/96	Supplement to brief.	[12/16 Supp]
12/16/97	Affidavit in support of jurisdiction	[12/16 Aff]
1/2/97	Supplemental Affidavits (of Richard Bert Allender and) Tina D. Allender	[1/2 Aff]
1/9/97	Additional Supplement for Court's review	[1/97 Supp]
1/27/97	Motion for Mandamus for Immediate Relief	[1/7 Mot.]
3/27/97	Response to entry	[3/27 Resp]

The court also has before it the government responses to Allender's filings. These responses are dated September 10, 1996, September 25, 1996 and November 26,1996.[1]

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[1] The Government submitted correspondence from Allender and others relating to the action being pursued by Allender against the United States Attorney's office in front of Chief Judge Barker. These letters were really collateral to the issues before this court, and accordingly were not taken into account in prepaying this entry.

The evidence at trial was abstracted in the opinion of the Seventh Circuit:

First State Bank of Morgantown, Indiana is a federally insured financial institution. 18 U.S.C. § 1344 makes it illegal to knowingly defraud or use false or fraudulent pretenses to obtain money from such a financial institution. Nevertheless, between September 1989 and July 1991, Allender obtained a series of nine loans from First State Bank using various false statements. Five of these loans were obtained by forging the signature of a longtime family friend and previous Morgantown resident, Ruth Howell. The first loan, in the amount of $15,000.00, was taken out on September 23,1989. Allender forged Howell's name on a promissory note and again on the disbursement check payable solely to Howell. The second loan was disbursed on October 25, 1989 in the amount of $26,000.00. Allender again forged Howell's signature on this loan, but was also a co-signor. Part of the proceeds of this second loan were used to pay off the first loan. The next three loans, dated April 23, 1990 ($25,000.00), October 20, 1990 ($23,000.00) and April 18,1991 ($19,000.00), were obtained in a fashion similar to the second loan-also without Howell's knowledge or consent-and were renewals of the second loan. After the last of these loans went into default, the bank charged off the balance.

On January 15, 1990, Allender used the name of Darren Whiteside to take out a loan of $24,000.00. Whiteside, a social acquaintance of Allender, had no business relationship with First State Bank. As with the Howell loans, this loan purported to bear the signatures of both Whiteside and Allender. Whiteside, however, testified that he had not authorized this loan. In addition, the collateral listed on the loan was not owned by either Whiteside or Allender. In fact, it did not exist. The bank charged off this loan too.

Finally, Allender secured three other loans by pledging collateral (heavy equipment) that did not exist. Two of these loans also purported to bear the signature of Allender's father, which Allender admitted to signing without his father's knowledge. Each of these loans went into default and were charged off by the bank.

After an FBI investigation uncovered these and other suspicious loan deals involving Allender and First State Bank, Allender was charged with violating 18 U.S.C. § 1344. The superseding indictment originally contained ten counts, but was reduced to nine after the district court granted, in part, Allender's motion to dismiss certain counts as multiplicitous. Of these nine counts (contained in the amended superseding indictment), Allender was convicted of eight. He was acquitted of count five, involving the Darren Whiteside loan. United States v. Allender, 62 F.3d 909,911-912 (7th Cir. 1995).

II. Jurisdiction

Before proceeding to the merits of the underlying § 2255 motion, the court will first deal with a challenge to its jurisdiction by Allender. Jurisdiction as a grounds for review is always available, and can be addressed even *sua sponte* by the court. *Kelly v. United States,* 29 F.3d 1107,1113 (7th Cir. 1994). The filings related to this issue were submitted after the materials dealing with the § 2255. While these filings are a bit hard to decipher,[2] the court believes that Allender is making three arguments. Allender first argues that this court is not an Article III court, as its authority only extends to

[2] Some of the legal memoranda are wildly off-point, referring to Florida law and an inmate imprisoned in Florida.

"Territories" of the United States, and he is not a citizen of the United States but rather the sovereign republic" of Indiana. Second, he argues that the federal statutes under which he was convicted in this case do not confer jurisdiction, as they were not "incorporated" until August of 1989, and that there was no proof that the institution he was convicted of defrauding was FDIC insured. Finally, he argues, citing *United States v. Lopez,* 115 5. Ct. 1624 (1995), that there is no "nexus" between the statute and the commerce clause.

The court will not waste much time with these fatuous arguments. They are supported in Allender's filings by caselaw that is almost always cited well out of context, and egregiously misquoted.[3] There is very little to discuss regarding them, but the court will address them in turn.

Allender's first argument, that he is not a citizen of the United States, is similar to arguments that have been

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[3] One example will suffice. To support his first argument, that this court is not an Article III court, Allender cites *Hatter v. United States,* 953 F.2d 626 (Fed. Cir. 1992). Allender quotes the footnote at the bottom of page 627 as reading, "No member of this panel was an Article III judge." (12/16 Supp. at 4.) Actually, the full sentence reads, "No member of this panel was an Article III judge *in 1984."* *Hatter,* 953 F.2d at 627 n.* (emphasis added). This was an important point in a case that dealt with an Article III challenge to the imposition, in 1983, of social security taxes to judicial salaries. *See Id.* at 627. The correct quotation does not, however, support Allender's outlandish theory. Other caselaw is similarly misquoted and mischaracterized.

advanced in the past by so-called "tax protesters." This kind of "non-citizen" argument has been described by the Seventh Circuit as "simply wrong." *United States v. Hilgeford*, 7 F.3d 1340, 1342 (7th Cir. 1993) (quoting *United States v. Sloan*, 939 F.2d 499 (7th Cir. 1991)). This statement by the Seventh Circuit is an excellent disposition of the argument, and the court will only comment on one aspect of the Defendant's version. The Defendant quotes numerous authorities for the proposition that District Courts established in United States territories are not Article III courts. *See, e.g., Mookini v. United States*, 303 U.S. 201 (1938). However, these cases deal with courts in *territories*, such as Puerto Rico and Guam, and not courts in *states*, such as Indiana. The individual states are what make up the United States; this is a premise which escapes the tax protesters and others of that ilk. Federal courts in the states accordingly have the judicial power described in Article III of the Constitution. Territories are not states, and therefore are not members of the United States. Federal courts in the territories acquire their authority from Congress, not the Constitution. *Mookini*, 303 U.S. at 204. The Defendant's strained attempt to transpose the precedent applying to federal courts in territories of the United States to federal courts based in states which are a part of the United States is, to borrow the Seventh Circuit's apt phrase, "simply wrong."

The Defendant's next argument seems to be that the First State Bank of Morgantown ("Bank") was not insured under the Federal Deposit Insurance Corporation ("FDIC"). Exactly how this is so is unclear; the Defendant ties this argument in to the supposed lack of "incorporation" between 18 U.S.C. § 20 and 12 U.S.C. § 1811. *(See* 1/27 Mot. at 2.) However, this "deficiency" was, according to the Defendant, cured in August of 1989. *Id.* Defendant's crimes occurred beginning in September of 1989; accordingly, whatever problem this alleged lack of "incorporation" caused was not

there when Allender began his activities. To the extent, however, that this argument can be interpreted to mean that the government did not show that the Bank was insured under the FDIC, the government did submit evidence at trial, without objection by the defense, that at all relevant times the Bank was insured by the FDIC. (Trial Tr. at 511.) Accordingly, this argument also fails.

Allender's final jurisdictional tree also fails to bear fruit. He argues essentially that the statute he was accused of violating, 18 U.S.C. §1344, is not constitutional under the case of *United States v. Lopez*, 115 S. Ct. 1624(1995), because there is an insufficient "nexus" to interstate commerce. He argues that since there already are state laws regarding bank robbery, the statute encroaches on the state's jurisdiction and therefore cannot be enforced against him.

Unfortunately for Mr. Allender there is a clear "nexus" between 18 U.S.C. § 1344 and a proper federal interest. The fact that an institution is insured by the FDIC provides the constitutional federal concern behind the criminal statute, and it is one that has withstood prior constitutional scrutiny. "[I]f a state bank chooses to come into the System created by the United States, the United States may punish acts injurious to the System, although done to a corporation that the State is also entitled to protect." *Toles v. United States*, 308 F.2d 590, 594 (9th Cir. 1962) (quoting *Westfall v. United States*, 274 U.S. 256 (1927)). *Lopez*, which deals with crimes created under the auspices of the Commerce Clause which are insufficiently linked to interstate commerce, is not applicable to this situation.

None of Allender's arguments on jurisdiction are persuasive. In fact, none of them are even plausible. Accordingly, jurisdiction over Allender and his crimes

properly rests with this court, which will proceed to examine the merits of his § 2255 motion.

III Standard of Review

28 U.S.C. § 2255 provides in relevant part:

> **A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence. . may move the court which imposed the sentence to vacate, set aside or correct the sentence.**

Habeas corpus relief under this statute is limited to "an error of law that is jurisdictional, constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *Borre v. United States,* 940 F.2d 215, 217 (7th Cir. 1991) (quoting *Carreon v. United States,* 578 F.2d 176, 179 (7th Cir. 1978)). Federal courts do not have the power under § 2255 to rectify errors short of constitutional magnitude; for example, this is not an opportunity to retry the petitioner's conviction in light of new evidence. *Guinan v. United States,* 6 F.3d 468, 470 (7th Cir. 1993).

IV. Discussion

The Defendant asserts a variety of claims under this statute, but they can be condensed into two general areas. First, the Defendant argues that there was prosecutorial

misconduct on the part of the Assistant United States Attorney ("AUSA"). As a result, he claims that the U.S. Attorney's office should be recused from the case. Second, the Defendant argues that his trial counsel was ineffective. As part and parcel of this claim, he also argues that his counsel on appeal was also ineffective. Finally, Allender requests an evidentiary hearing. The court will examine each argument in turn.

A. Prosecutorial Misconduct

The court first examines Allender's claims of prosecutorial misconduct, and his request that the U.S. Attorney's office be recused from the case. Recusal of a U.S. Attorney due to a claimed conflict of interest is a severe action to be hesitantly used. *In the Matter of Grand Jury Subpoena of Rochon,* 873 F.2d 170,176 (7th Cir. 1989). The court's first step will be to see if there is any validity to Allender's claim of misconduct. If Allender fails to raise even a possibility that misconduct occurred, there is little reason to see if recusal for a conflict is warranted.

Allender throughout his filings makes several conclusory statements that the prosecutor was engaging in malicious acts towards him, in collusion with his trial attorney. The only claim, however, for which Allender offers any evidence is that the AUSA withheld evidence in violation of *Brady v. Maryland,* 373 U.S. 83 (1963). *Brady* requires that any exculpatory evidence in the possession of the U.S. Attorney must be disclosed to the defense. *Id.* at 87. Using the affidavits of Tina Allender ("Tina"),[4] Bill Allender ("Bill"),

[4] The court means no disrespect by using the first names of the other members of Allender's family. It is only to avoid confusion as there are several figures in this case with the last name of Allender.

Christine Allender ("Christine"), and Calvin Hultquist ("Hultquist"),[5] Allender is claiming that the AUSA withheld documents that contained exculpatory evidence

There are three documents referenced in the filings regarding misconduct. The first is a handwritten note supposedly written and signed by Blanche Crawford ("Crawford"), the president of the Bank, which states in full, "The 26000 [sic] loan is OK. Give Allender necessary papers. I will call Mrs. Howell." The second is a typed note from Howell which allegedly gave Allender permission to sign her name on a note to borrow money from the bank. The third is the report of Sergeant Ken York of the Indiana State Police investigating Al lender's activities.[6] It is not exactly clear if Allender is using one or all documents to show a *Brady* violation, so the court will examine the circumstances surrounding each.

The court will start with the Howell note because it is easily disposed of. The defense had this note in its possession, and, in fact, the note was presented as evidence at trial as Government Exhibit 22. (Trial Tr. at 178.) "The government will not be found to have suppressed information if that information was available to the defense through the exercise of reasonable diligence." *United States V. Hamilton,* 1997 WL 67947 at *10 (7th Cir. Feb. 19,1997), to *be reported at*

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[5] Hultquist was hired by Allender to interview witnesses. (10/29 Reply.)

[6] This report and another document are the focus of Allender's motion to release sealed documents (8/19 Mot.), which the court will address below in conjunction with the claim of prosecutorial misconduct.

107 F.3d 499. This letter was mailed by Howell to the Defendant, and was introduced into evidence at trial by the prosecution. *Id.* It is impossible to say how this could be seen as hiding exculpatory evidence in violation of *Brady.*

The second note, the Crawford note, fares no better. The photocopy of this note submitted as an exhibit by Allender in his filings clearly shows a defense exhibit sticker attached to the note. (7/1 Memo.) Moreover, Allender attempts to use this same note as evidence of ineffective representation by his trial counsel, stating that Richard Kiefer ("Kiefer") had the note in his possession and failed to use it at trial.[7] (10/29 Reply at 3.) Therefore, Allender is claiming both that the Government hid the note from the defense, and that his counsel was ineffective because it did not present the note in his possession as evidence. Allender cannot have it both ways.

The final document is the report of Sergeant York. Allender points out that at trial, this AUSA was ordered to produce a copy for *in camera* review to see if it contained any exculpatory material. Allender now claims that the report was never submitted for *in camera* review, that the AUSA claims it was lost, and that accordingly bad faith and misconduct is shown on the part of the AUSA. (12/16 Res p. at 6.) There is one problem with this, however. The report was submitted to the court and examined during trial. During this § 2255 litigation, counsel for the government requested the sealed York document; somehow the Clerk of the Court could not locate the document. However, on this court's request the Clerk was able to retrieve the sealed document. This court examined the document, which is in the same condition as when the court examined it at trial. As at trial, there is no

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[7] Whether this actually was ineffective assistance will be discussed *infra.*

exculpatory material contained within; accordingly, the report is not subject to the *Brady* doctrine.[8] Clearly, Allender has failed to present any credible evidence that there was misconduct on the part of the AUSA. Accordingly, his motion to recuse the AUSA is **DENIED**.

B. Ineffective Assistance of Counsel

The court first examines more closely the operation of § 2255 motions in situations like the Defendant's. Allender is arguing ineffectiveness of trial counsel when that issue has already been argued at appeal.[9] This puts Allender in an

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[8] For this same reason, the Defendant's motion to release the document is **DENIED**. This leaves the other requested documents which are documents obtained at trial from the FDIC and Indiana Department of Financial Institutions. These documents were filed with the court before trial, and in an order dated April 18, 1994, certain of them were disclosed to the defense. The remaining documents were sealed and subject to a stipulation and protective order either because they were not related to the case, or because they were subject to law enforcement/deliberative process privilege. Allender does not state how these sealed documents would be beneficial to his § 2255 motion, and offers no reason why the court's findings regarding those documents should be changed. Finally, this court's recent review of these documents confirms that they do not contain exculpatory material. Accordingly, the motion to disclose these documents is **DENIED**.

[9] Allender obtained new counsel on direct appeal. Among other issues, Allender argued on direct appeal that he received ineffective assistance of counsel and that this court erred in determining his sentence.

awkward position, as his argument at the time of appeal was limited to the record, and the appellate court's finding on the issue could be binding. *Guinan*, 6 F.3d at 471; *Bond v. United States*, 1 F.3d 631, 634-35 (7th Cir. 1993). As the case of *United States v. Taglia*, 922 F.2d 413, 418 (7th Cir. 1991), explains, the Defendant whose ineffectiveness argument relies on evidence outside the trial record is better off waiting to file a § 2255 motion.

The Defendant whose counsel does raise the issue faces the prospect of having the appellate court's ruling on the issue become the law of the case. *Taglia*, 922 F.2d at 418. However, this does not mean that it is always a good idea to avoid the issue of incompetent trial counsel on appeal. If the appellate counsel is different from the trial counsel, and the issue can be raised on the record, a failure to argue ineffectiveness of counsel can waive the argument. *Id.* Any failure to raise an issue which is presented by the trial record bars an appellant's ability to raise the issue in a postconviction proceeding. *Id.* As the Seventh Circuit phrased the problem,

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[10] This does not mean that the ruling applies to the general issue of effective representation. It only means that the specific grounds raised--in this case, the failure to call Hamilton--cannot be raised again in a collateral proceeding except in the narrow circumstances described by the above cases. All new claims of ineffectiveness in a collateral proceeding, however, must have a basis in new evidence not available at the time of appeal.

"If. . . presenting a claim of ineffective assistance of counsel on direct appeal is Scylla, could not failing to present it on direct appeal be Charybdis?". *Id.*

For the counsel who does raise the ineffectiveness argument on direct appeal, a ruling that trial counsel was effective becomes the law of the case. *Id.*[10] A district court cannot reexamine the appellate court's ruling on the issue "unless there is some good reason for reexamining it." *Id.* (quoting *United States v. Mazak,* 789 F.2d 580, 581 (7th Cir. 1986)). One such good reason is the existence of new evidence. *Id.* (citing *United States v. Layton,* 855 F.2d 1388, 1403 (9th Cir. 1988)). However, "if the defendant at this [postconviction] stage tenders evidence from or about the performance of his trial counsel, he faces an uphill battle, once again--this one to persuade the district judge that it is an 'unless' case." *Id.*

Allender's first argument is that his appellate counsel was ineffective for a variety of reasons. His second is that he has new evidence of the ineffectiveness of his trial counsel. The court will examine each argument in turn.

1. Appellate Counsel

The standard for determining whether appellate counsel has been ineffective is the same standard as for trial

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[10] This does not mean that the ruling applies to the general issue of effective representation. It only means that the specific grounds raised--in this case, the failure to call Hamilton-- cannot be raised again in a collateral proceeding except in the narrow circumstances described by the above cases. All new claims of ineffectiveness in a collateral proceeding, however, must have a basis of new evidence not available at the time of appeal.

counsel. The defendant must provide evidence that; (1) counsel's representation was deficient; and (2) that this deficiency prejudiced the defense so as to render the proceedings intrinsically unfair or unreliable. *Strickland v. Washington,* 466 U.S. 668, 688 (1984). In addition, "appellate counsel is ineffective if counsel fails to raise issues that are (1) obvious, and (2) learly stronger than the ones raised." *Kelly,* 29 F.3d at 1112). The reason why the issue must be "clearly stronger" is because ordinarily the strategic decisions of counsel, including the selection of issues for appeal, do not violate the Sixth Amendment. *Bond,* 1 F.3d at 635 n. 2.

Allender makes three arguments regarding the alleged ineffectiveness of his appellate counsel, Carl Epstein ("Epstein"). Defendant first argues that his appellate counsel was ineffective by failing to raise the claim that this court erred in determining the time of the offense in calculating loss. His second argument is that appellate counsel failed to raise the claim that this court erred in sentencing by refusing to recognize Allender's disability insurance as a source to offset the calculation of loss. Finally, he argues that appellate counsel was ineffective by raising the issue of ineffectiveness of trial counsel on direct appeal.

Allender claims that appellate counsel was deficient in not raising the issue concerning the calculation of the time of the offense. According to the Federal Sentencing Guidelines, the amount of loss for sentencing purposes is the amount unpaid on the loan "at the time the offense is discovered." U.S.S.G. §2F1.1 app. note 7(b). This court ruled at sentencing that the time the offense was discovered was on March 27, 1992, the date that the Bank charged off the balance of the loan. This ruling was unchallenged by both trial and appellate counsel.

Allender claims, however, that the date the offense was discovered is not this date, but May 19, 1992, the date the FBI interviewed his parents and discovered that they had not signed the loan notes, and October 26, 1992, the date that Howell acknowledged that she had not signed the loan notes. Appellate counsel did, however, challenge the sentence based on the inclusion of interest due, and loans for which no finding of guilt was made at trial. However, since Allender's appellate counsel did not raise the timing issue, Allender believes he was ineffective in pursuing the case.

Unfortunately for Allender, the inquiry for this court is whether this issue is "clearly stronger" than the others raised, taking it out of the realm of a mere strategic decision. At sentencing, the president of the Bank testified that on February 12,1992, Allender's mother told him that she had not signed the notes bearing her name. (Sent. Tr. at 29.) With this knowledge on March 27, with the loan in default, the Bank charged off the loan. Clearly, at this point, the Bank had discovered that beyond mere default, Allender had engaged in fraud. The later investigations by the FBI in May and October confirmed that fact, but did not change that March 27 was the date the Bank realized that an offense had occurred. With these facts at evidence, it cannot be said that challenging the date of discovery was an issue "clearly stronger" than the other sentencing issues presented on appeal. In fact, this court cannot even say that appellate counsel was deficient in ignoring this issue, as it was perfectly clear from the record that the Bank had discovered the offense by at least March 27, 1992, and a challenge to this would yield little fruit. The Guidelines do not require that there exist full evidence of guilt at the time of "discovery," only evidence of the offense. Appellate counsel was therefore not deficient on this point.

The resolution of this issue actually affects the second issue that Allender brings as having been mistakenly ignored

by appellate counsel. Allender cites the case of *United States v. Mount*, 966 F.2d 262, 266 (7th Cir. 1992) for the proposition that, "The difference between gross and net loss matters if the offender has paid in part before detection or the victim has access to a ready source of compensation such as the assets securing the fraudulently-obtained loan." Allender had disability insurance payments that he used to pay towards the balance of the loan, beginning on May 20, 1992. (3/28 Mot. Exs. 2-8.) He claims that, contrary to this court's ruling, *Mount* provides authority for the proposition that such payments should be subtracted from the amount of loss; counsel was therefore deficient in not raising the issue on appeal.

Since, however, the date of discovery was in March, the beginning of these payments in May do not matter, as this court originally ruled. *Mount* requires that payments made "before detection" must be subtracted from the loss. *Mount*, 966 F.2d at 266. Detection in this case, however, as discussed above, occurred in March of 1992. Subsequent payments do not count, and it is small wonder that counsel therefore selected other issues to argue on appeal. Accordingly, appellate counsel was not deficient on this point.

The final issue raised by Allender is slightly different. Here, Allender does not argue that his appellate counsel failed to raise an issue. Instead, Allender claims that counsel was in error to raise the issue of ineffective assistance of trial counsel. Since the raising of the ineffectiveness issue on direct appeal has ramifications for this collateral action, it is not surprising that Allender claims that appellate counsel was himself ineffective. If this were true, the appellate court's earlier ruling that trial counsel was effective would lose its force.

Allender relies on two things to support this claim. The first is the appellate court's warning to counsel at oral

argument about the wisdom of raising the ineffectiveness claim on appeal, and the precedent, such as *Bond*, which formed the basis for the court's warning. *Bond*, 1 F.3d at 635 ("a defendant who presents an ineffective-assistance claim for the first time on direct appeal has little to gain and everything to lose.") (quoting *United States v. Davenport*, 986 F.2d 1047, 1050 (7th Cir. 1993)). Second, Allender relies on his own assertions about the interaction between himself and counsel.

As to the first point, it is true that the appellate counsel who raises the issue of ineffectiveness of trial counsel on appeal risks a great deal. However, waiting for a collateral action brings with it its own risks that the issue may have been waived. The question facing appellate counsel is whether there is enough evidence in the trial record to warrant going forward with the issue. Here, counsel was focusing on the failure to call Esther Hamilton ("Hamilton"), the Bank's loan officer as a witness. As will be discussed below, there was no evidence outside of the record that would have added anything to this ineffectiveness claim. Accordingly, the court cannot say that, facing the difficult decision between not raising the issue and possibly waiving the issue, appellate counsel made a clearly deficient decision.

As to Allender's assertions, he does not exactly help himself on this matter. Allender first asserts that counsel never discussed with him whether to raise the issue of ineffectiveness on appeal. (7/30 Reply at 3.) The government filed a response pointing out that Allender was not claiming that he had instructed counsel not to raise the issue. Allender subsequently filed an assertion that counsel had visited him in prison and shown him a draft of the appeal, whereupon Allender specifically instructed counsel not to raise the ineffectiveness issue. (10/29 Reply at 2.) Allender does not explain how counsel could have not discussed the issue with

him, and yet have been told not to pursue the issue on appeal.[11] Further damaging to Allender are his assertions that one of the main reasons he brought in different appellate counsel was to talk to Hamilton and "utilize her on appeal," an activity clearly consistent with pursuing an ineffectiveness claim. (7/30 Reply at 2.) Accordingly, this court finds that appellate counsel was not ineffective, and Allender's motion is **DENIED** on this point.

There is one more issue raised regarding Epstein outside of his conduct on appeal that the court needs to address. Tina, in an affidavit, claims that Epstein attempted to misrepresent the Allender's financial status to this court, in order to be paid by both Allender's parents and as appointed counsel. (10/29 Reply Ex. J. at ¶ 4.) In furtherance of this, Tina asserts, Epstein attempted to persuade her and Allender to represent that they were divorced, which they refused to do. *(Id.* at ¶ 5-6.) If these allegations are true, they show an attempt to commit a fraud on this court in order to acquire financial gain. However, it is not, even if true, ineffective assistance. There is no assertion made, nor can it be seen, how this alleged proposal by Epstein prejudiced Allender on appeal in any way. If it occurred, It may have been unethical activity, but it is not related to Epstein's actual performance on appeal. Accordingly, to the extent this attempts to raise an issue of ineffectiveness of appellate counsel, the Defendant's motion is **DENIED** as to this point.

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[10] It will be evident from the court's rulings throughout this entry that it finds Allender to be no more credible in his sworn assertions in this § 2255 proceeding than the jury found him at trial. That is to say that the internal contradictions and contortions of the truth in his submissions in this proceeding doom it to failure.

2. Trial Counsel

The court reaches the final stage, which is to examine Allender's claims that his trial counsel, Attorney Richard Kiefer ("Kiefer") was ineffective. As noted above, the Seventh Circuit has already ruled that Kiefer was not ineffective regarding the failure to call Hamilton as a witness. Accordingly, this finding is the law of the case regarding this issue, and the Defendant will have a heavy burden to show that this court should overturn that finding.

As for the remaining multitude of issues that Defendant raises regarding the conduct of his trial counsel, all are new. Therefore, as discussed *supra,* they will be consider waived by their failure to be included on direct appeal unless Defendant can carry his burden of showing that the claims are based on extrinsic evidence not available on appeal. Much time and space could be wasted here by listing them all; there are several assertions that are presented with no supporting evidence whatsoever, and they will not be discussed. However, for those claims which Allender at least attempts to support, the court will proceed to examine each one in turn to determine if there is sufficient evidence to warrant the survival of Allender's § 2255 motion.

a. Sentencing Issues

Allender raises the same sentencing issues regarding his trial counsel as he did with regard to his appellate counsel. As the court has discussed, *supra,* in the context of his appellate counsel there is really no deficiency regarding these arguments. Finally, the evidence regarding these issues is based on the trial record; the only real extrinsic evidence offered by the Defendant are copies of his disability insurance

checks, and, as discussed before, these do not raise any issue regarding sentencing. Accordingly, Defendant's motion is **DENIED** on this point.

b. Esther Hamilton

This issue in particular is one on which the Defendant places great emphasis. Hamilton was the Bank's loan officer, and involved in many of the loans that were part of the indictment. There were several circumstances surrounding her involvement with Allender (such as her desire that he not go into bankruptcy, the peculiarity of the numerous loans she gave to or on behalf of Allender, and Allender's own debts to her) that led to her becoming a target of the federal investigation. It was stipulated between both parties (a stipulation of which Allender asserts he was not aware and did not approve--although it was announced in his presence in open court during trial) at trial that Hamilton was unavailable for trial, because she was a target of investigation and would have invoked her Fifth Amendment right against self-incrimination if she was placed on the stand. (Trial Tr. at 631.) It was on this basis that the Seventh Circuit found that Kiefer had not been ineffective on this issue.

Now, Allender offers the affidavit of Hamilton. In this affidavit, she discusses what she would have said on the stand. This of course, comes as little surprise to the court as this very testimony was heard at trial from Allender himself. *(See generally* Trial Tr. at 728-1008.) The only new thing in the affidavit is Hamilton's assertion that she would have testified if called, and would not have taken her Fifth Amendment privilege. (10/29 Reply Ex. P.)

It is of course difficult to ascertain the proper weight to give to the statement of an interested witness who claims she would have done something after the fact. However, the court does not even need to address this. At the time of the trial, Hamilton's attorney, James H. Voyles, had told the parties that he had advised Hamilton to invoke her Fifth Amendment privilege if she was called to the stand. (9/10 Gov. Resp. Ex. F at ¶ 4-5.) Hamilton had been fired from the bank, and was facing investigation about possible gain on her part from the Allender transactions.

In short, the only new evidence offered by Allender is Hamilton's statements that she would have testified. This court must look at the attorney's actions without the benefit of hindsight. *Cuppett v. Duckworth,* 8 F.3d 1132, 1135-36 (1993). At the time of trial, all the available information indicated that Hamilton would not be available. Accordingly, the appellate court's ruling on this matter controls and the Defendant's motion is **DENIED** on this point.

C. Failure to Interview and/or Call Witnesses

There are number of witnesses that Allender complains were not interviewed properly or not called. First, he lists John Woods, Becky Kaster, Becky Dillon, Ed King, Dale Bond, Terry Rowland, Lee Morgan, DeWayne Hamilton, Dr. Springhorn, Brenda Henderson, and Lowell Hayworth and other unnamed witnesses as being witnesses who were not pursued by Kiefer and who would have shown that Defendant did not intend to defraud the Bank. However, Allender offers nothing besides these conclusory allegations to demonstrate that these witnesses would overcome the

evidence established at trial. Accordingly, Allender has failed to establish prejudice as regards to these potential witnesses. *United States v. Olson*, 846 F.2d 1103, 1109-10 (7th Cir.), *cert.* denied, 488 U.S. 850 (1988).

Beyond these witnesses, however, are a series of persons that were not called to testify either at trial or at sentencing whom Allender now insists should have been called. Normally, the decision not to call a witness is a tactical decision which is not subject to review. *Olmstead V. United States,* 55 F.3d 316, 320 (7th Cir. 1995). The exception to this is when the action by counsel is so unreasonable as to be beyond normal, professional representation. *Barnhill V. Flannigan,* 42 F.3d 1074,1078 (7th Cir. 1994). And even if the mistake is unreasonable, it must still unfairly prejudice the defendant in order to be considered ineffective assistance. *Id.* Accordingly, it is with this standard that the court examines each of Allender's "witnesses."

i. Christine Allender

At sentencing, there were several loans not charged in the indictment which were considered as relevant conduct. One of these was a loan to which Allender forged Christine's signature, and secured by a Mercedes that was titled to his mother. At the sentencing, the government presented evidence from an FBI agent and Bank President Dean Hawkins ("Hawkins") that Christine had told them that she had not signed the loan or provided any authorization. (Sent. Tr. at 29, 75, 53, 75, 94,170.) Kiefer did not call Christine to the stand, but did extract from the FBI agent testimony that Christine had authorized Allender to sign her name on insurance documents related to the car. (Sent. Tr. at 94.)

Allender now submits an affidavit from his mother, Christine, regarding her not testifying at sentencing. She

claims in the affidavit that she orally authorized Allender to "sign bank records and insurance records pertaining to a Mercedes automobile." (3/28 Mot. Aff. at ¶ 5.) She also claims that she had discussed the Mercedes with Allender and that she orally authorized him to use the car as collateral. (Id. at ¶ 6.) Allender claims that Kiefer was deficient in not calling Christine.

Again, the question was whether this decision was unreasonable and prejudicial. It was neither. To begin with, the value of an unquestionably loving parent's testimony on behalf of a child at sentencing is traditionally viewed somewhat suspiciously. In addition, as Christine admits, she was ill at the time of the sentencing. In fact, Allender himself stated at sentencing that his mother and father were "extremely ill. That is why they are not here today." (Sent. Tr. at 213.) Finally, the affidavit itself states that Christine did not sign the loan note, and told the agent that she did not recall Allender asking for permission to sign any notes. This corroborates, rather than conflicts with, the testimony at sentencing. When all of these factors are considered, Kiefer's decision not to put Christine on the stand at sentencing cannot be seen as deficient, especially when the lack of her testimony would not have prejudiced his client. Accordingly, Allender's motion is **DENIED** on this point.

ii. Bill Allender

Allender's father, Bill, submitted affidavits claiming that he had testimony that would have aided Allender at trial on the issue of his intent. Bill claims that he would have been able to provide testimony that he had given permission to sign his name to obtain a loan from the bank. According to Bill, "This was done only to provide insurance for the loan, and

was done with Esther Hamilton's full knowledge." (5/17 Mot. Ex. Dat¶4.)

Again, Kiefer's decision not to call Bill was neither deficient nor prejudicial. To begin, the same concerns about parental interest in the case, and illness at the time, apply to Bill as much as to Christine. Even more so, considering that Allender himself testified at trial that his father was too ill to be able to attend the trial. (Trial Tr. at 833.) More importantly, however, is the fact that the affidavit does not contradict the trial evidence that Allender forged his father's name on the loan note. Bill states only that he gave Allender permission to sign his name "to provide insurance" for the loan. This is not the same as actually obtaining the loan as "Bill Allender," which was what the evidence showed at trial. Finally, the fact that Hamilton may have had knowledge of Allender's shady dealings (and may even have been a participant) is immaterial. What matters is that Allender defrauded the *Bank*, not a particular Bank official. *United States V. Molinaro*, 11 F.3d 853, 857 (7th Cir. 1993).

iii. Rhonda Sue Allender

Rhonda Sue Allender ("Rhonda"), Allender's ex-wife, submits an affidavit that contains basically the same testimony as Allender's father's affidavit. (5/17 Mot. Ex. B.) She states that Bill had given Allender permission to sign his name for insurance purposes only, and that Hamilton required Allender to pay the balance of "other people's" notes that had defaulted. *(Id.)* As to the first part of this testimony, it does not raise any issue of ineffective assistance for the same reasons, stated above, that Bill's testimony similarly fails to raise an issue. The second part of this testimony does not contradict or contest any of the evidence presented at trial or at sentencing, and in fact seems completely unrelated to the

case against Allender. Accordingly, the Defendant's motion is **DENIED** as to this point.

iv. Sandy Fields Jaynes

Sandy Fields Jaynes ("Jaynes"), Allender's sister, provides an affidavit saying that her testimony could have helped her brother. (5/17 Mot. Ex. E.) She does not say what that testimony is, except to say that she could have generally provided testimony as a member of his family, and that might have helped Allender on bond. The bond issue has been dealt with in another entry from this court, and there is nothing in the affidavit that contradicts the evidence at trial and sentencing. Accordingly, this affidavit raises no issue on ineffective assistance, [12]and the Defendant's motion is **DENIED** as to this point.

v. Harry Eck

It is unknown what relation Harry Eck ("Eck") has to Allender, or to Walter Wallace Eck, who did testify at trial. This affidavit does not state the specific nature of Eck's testimony. It only generally states that Eck had evidence that would affect the credibility of Whiteside. (5/17 Mot. Ex. C.) However, Allender was acquitted of the count involving the Whiteside loan. Accordingly, this affidavit raises no issue of ineffective assistance, and Defendant's motion is **DENIED** as to this point.

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[12] Allender also submitted a supplement to Jayne's affidavit in the 10/29 Reply. It describes her giving Allender a ride to the Bank, and little else. Jaynes crossed out several paragraphs before signing the affidavit.

vi. Terry Ratcliff

As with Eck, Terry Ratcliff's ("Ratcliff") affidavit is not specific as to the nature of the omitted testimony, only that it would have "devastated" the credibility of Darren Whiteside ("Whiteside") and Fred Fath ("Fath"), and that Ratcliff was present for conversations between Allender and these two participants in the loan scheme. Again, Allender was acquitted of the Whiteside loan count. As for Fath, Ratcliff claims that he was present for conversations where Fath had discussed obtaining equipment from his uncle as collateral. This still does not change the fact that at trial, the evidence (including Allender's own admissions) showed that Allender did not possess the particular collateral listed when he pledged it for the loans in question. Finally, Kiefer may have made a conclusion about the credibility of Ratcliff as a witness that led him not to call Ratchif to the stand. Considering the weak nature of the testimony offered, this court cannot say that Kiefer was deficient in failing to call Ratcliff. Accordingly, the Defendant's motion is **DENIED** on this point.

vii. Tina McKoon-Allender

Tina, now Allender's wife, has presented a raft of affidavits, claiming that she had information that she could have presented at trial that would have aided Allender. This is perhaps the most ludicrous section of claims. To begin with, Tina states that she had proof that Ruth Howell lied on the stand, and that Tina asked Kiefer to put her on the the fact that *Tina testified at trial,* and said nothing about Howell. (Trial Tr. at 1021-43.)[13]

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[13] This couple seems well suited for marriage. As illustrated by this assertion, the court finds Tina's credibility to be on a level with Allender's, that is, well below par.

Tina states that she possesses a letter from Todd Allender ("Todd") that reportedly contains the "truth." This letter is supposedly attached to the 10/29 Reply Exhibit I, but no letter has been presented to the court. Finally, she states that she could have impeached the credibility of Fath, because she was present with Fath and Allender when they were at Hamilton's home. (10/29 Reply Ex. G. at ¶ 5) However, at trial Kiefer questioned her extensively about her contact with Fath. (Trial Tr. at 1034-41.) Further, Kiefer asked her specifically if she had ever been at Hamilton's house with Fath and Allender. (Trial Tr. at 1041.) She testified that she had not. *Id.* Clearly, none of the foregoing can be said to raise any question of ineffectiveness of trial counsel. Accordingly, the Defendant's motion is **DENIED** on this point.

d. Failure to Interview and Question Ruth Howell Properly

Howell testified at Allender's trial. However, Allender is now claiming that she was not questioned effectively by Kiefer. He has submitted an affidavit by Howell, in support of this proposition, in which she states that she made several misstatements at trial. He claims that if Kiefer had interviewed Howell before trial he could have corrected Howell's "understanding."

There are several problems with this claim. First, Howell was a prosecution witness, and Kiefer's decision not to interview her would therefore fall under a understandable and reasonable strategic decision. Beyond this, however, is the fact that Howell's affidavit does not reveal any evidence which would prejudice Allender or render his trial fundamentally unfair. The affidavit only asserts two real

"misstatements": (1) that a letter Howell had written, introduced at trial, "may have" been to consolidate larger loans already given to Allender; and (2) that she had first learned of the $18,000 loan before visiting the Bank in October, 1992 when she was interviewed by the FBI.

The first misstatement is a model of vagueness, and cannot overcome Howell's clear testimony at trial that she did not give permission for the loans that were the basis of the indictment. (Trial Tr. at 207.) [14] In addition, the following paragraphs of the affidavit reinforce her trial testimony that she did not verbally approve the loans to Blanche Crawford over the telephone. (10/29 Reply Ex. C at ¶ 6e.)

As for the second statement, there is no impact to the issue of Allender's criminal guilt. Whether Howell first learned of the loans in October or when the FBI interviewed her earlier does not impact on the evidence at trial showing Allender forged her name to the loans without her permission. Either discovery happened after the fraud had occurred, and ultimately they make no difference. Accordingly, Allender's motion is DENIED on this point.

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[14] Howell's latest affidavit claims that at trial she was unable to hear or understand defense counsel. Her recollection of this is in stark contrast to the court's observation of those events. Howell was a remarkably alert witness and very clear in her responses to questions. There was no indication that her hearing and understanding of the questions of both counsel was inadequate.

e. Speedy Trial Act

Allender claims that he ordered Kiefer specifically not to ask for a continuance, but that Kiefer ignored his wishes. He further claims that Kiefer forged his name on a waiver of a speedy trial motion. In support of this allegation, Allender offers only the affidavit of Hultquist, an attorney whom he hired to investigate his case, who states that he has examined the waiver and does not think that it looks like Allender's signature.

Allender does not assert that Hultquist is an expert in handwriting analysis, and in fact Hultquist disclaims such expertise. Therefore, the weight of this supporting testimony is dubious as it would not even be worthy of consideration at trial under the evidence rules for expert testimony. For that matter, the court's examination of Allender's signature on other documents in the court's files, including his motion for continuance filed prior to the one he now claims is forged, indicates to the court's untrained eye what appears to be identical signatures. Beyond this, however, is the fact that Allender has not stated how this action by Kiefer, if it occurred, prejudiced him or rendered his trial fundamentally unfair. Accordingly, Allender's motion is **DENIED** on this point.

f. Failure to Ask for Dismissal Based on Prosecutorial Misconduct

The court has examined the issue of prosecutorial misconduct, above, and concluded that there was none in this case. It therefore could not have been deficient of Kiefer not to move for dismissal based on prosecutorial misconduct when there was none there. Accordingly, the Defendant's motion is **DENIED** as to this point.[15]

g. Failure to Present Letters From Howell and Crawford

Allender claims that Kiefer was deficient in not offering letters by Howell and Crawford into evidence. The letter from Howell states that she gave permission to for Allender to sign her name for an unspecified loan from the bank. The letter (actually a handwritten note) from Crawford to Hamilton appears to approve a $26,000 loan. These are the same letters that are at issue in Allender's claim of prosecutorial misconduct, *supra*.

The Howell letter is easily disposed of. As the previous discussion on prosecutorial misconduct showed, the letter in fact was admitted into evidence at trial as Government Exhibit 22. (Trial Tr. at 178.) Therefore, there can be no ineffectiveness on the part of Kiefer for failing to use the letter at trial, as it was already in evidence.

The Crawford letter was not introduced at trial, even though it was in the possession of the defense. Allender argues that the decision not to use the letter was unreasonable and prejudiced Allender so as to render his trial fundamentally unfair. Unfortunately for Allender, neither proposition is true.

To begin with, the letter from Crawford was hearsay evidence, presented in a document that, due to the death of,

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[15] It does not appear to the court that Allender has argued that his conviction should be set aside on the basis of prosecutorial misconduct standing alone. However, to the extent that his filings do make such an argument, the finding of no misconduct means that such a motion is also **DENIED**.

Crawford before trial would have been difficult to authenticate. The dubious admissibility of the letter makes the strategic decision by Kiefer not to use it at trial reasonable. However, even if the letter could have been introduced into evidence, there was no damage to the Defendant's case because the information contained in the letter was revealed at trial.

The substance of the letter is that Crawford approved of the $26,000 Howell loan, and would verify the authorization from Howell over the phone. Roberta Neal, a Bank employee, testified at trial that Crawford told her that, "it was okay to go ahead with the [Howell] loan," and that, "she [Crawford] okayed it over the phone." (Trial Tr. at 402.) Accordingly, the content of the letter-that Crawford had known and approved of this Howell loan-was presented in court.[16] At best, the note would have been cumulative evidence, and the failure to produce cumulative evidence cannot serve as a basis for a finding of ineffective assistance. *See United States V. Olson,* 846 F.2d 1103, 1110 (7th Cir.) (finding no ineffective assistance where omitted testimony was, among other things, cumulative), *cert denied,* 488 U.S. 850 (1988). Accordingly, the Defendant's motion is DENIED on this point.

C. Evidentiary Hearing

Allender requests an evidentiary hearing pursuant to his § 2255 motion. However, if "the record shows conclusively shows that the defendant is entitled to no relief,"

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[16] This testimony came out after a long argument on the hearsay nature of the testimony, narrowly won by the defense. This fact adds to the reasonableness of Kiefer deciding not to use a hearsay document.

this court can dismiss a § 2255 motion without such a hearing. *United States V. Prewitt*, 83 F.3d 812, 819 (7th Cir. 1996). The entire discussion, *supra*, shows that, despite the small forest of paper submitted by Allender, no new evidence has been presented which calls the trial and appeal into question. Accordingly, the Defendant's motion is **DENIED** on this point.

V. Conclusion

For all of the foregoing reasons, the court finds as follows: (1) this court has proper jurisdiction over Allender; (2) the Government did not engage in prosecutorial misconduct; (3) Allender's appellate counsel was not ineffective; (4) Allender's trial counsel was not ineffective; and (5) the record conclusively shows that Allender is not entitled to an evidentiary hearing. Accordingly, Defendant Allender's motion for relief under § 2255 is **DENIED**, and the motion is **DISMISSED** in its entirety. In the final analysis, after having observed the trial and after a thorough review of the record in connection with the § 2255, this court can fairly say that no injustice was done in this case. Allender had a fair trial at which he was represented by competent, employed counsel of his own choosing. His appeal of the conviction and sentence was fairly and justly addressed, and again he was represented by competent, employed counsel of his own choosing. No more scrutiny of this case is necessary or appropriate.[17]

ALL OF WHICH IS ORDERED this 21st day of April 1997.

A True Copy:
Teste:

John Daniel Tinder, Judge
United States District Court

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[17] As a final matter, shortly before this ruling Allender filed, on April 17, 1997, through recently obtained counsel a Motion for Release Pending Appeal Pursuant to Rule 9(B) (apparently of the Federal Rules of Criminal Procedure). To the extent that this motion for bond pending this collateral review, the motion is identical to the earlier motion for bond denied by this court. If it is a motion for bond pending the appeal of this court's ruling on the previous motion for bond, no notice of appeal has been filed yet, and accordingly the motion is premature. In either case, the motion is **Denied.**

CERTIFICATE OF SERVICE

This is to certify that I have served 2 copies of the foregoing Petitioner's Appendix to Petition for Writ of Certiorari, by mailing a copy thereof by first class mail to James M. Warden, United States Attorney, Office of the United States Attorney, 5Th floor, United States Courthouse, 46 East Ohio Street, Indianapolis, Indiana 46204,and to the Solicitor General of the united States Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W.,Washington, D. C. 20530. on this 12th day of June 1999.

Richard Allender
Pro SE